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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC.; COX CABLE OF  
OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.;  
AND SAMMONS COMMUNICATIONS, INC.,

*Petitioners,*

v.

RICHARD A. CRISP, DIRECTOR,  
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,  
*Respondent.*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

REPLY TO OPPOSITION TO  
PETITION FOR CERTIORARI

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Respondent appears essentially to contend that the First Amendment issues presented by Oklahoma's ban on alcoholic beverage advertising do not merit review by this Court because (1) a state may prohibit the dissemination of "mere" commercial speech if the prohibition is supported by a substantial state interest; (2) Oklahoma's power to regulate the sale of alcoholic beverages under the Twenty-first Amendment overrides petitioners' interest in the dissemination of commercial speech; and (3) the state has no purpose to inhibit noncommercial speech. Respondent's arguments cannot obscure the importance of the issues presented here or the degree to which the

decision of the court below conflicts with pertinent decisions of this Court.

# I.

1. In contending that this case involves only a restriction on commercial speech, and that petitioners "are not prohibited from transmitting all other types of programming into Oklahoma,"<sup>1</sup> respondent ignores the Oklahoma restriction's substantial impact on the dissemination of noncommercial speech. As discussed in the petition, the Oklahoma ban on advertising of alcoholic beverages effectively prevents cable television operators from transmitting not only wine advertisements, but also information and entertainment programming that contains such advertisements.<sup>2</sup> The mere fact that a regulation on its face is directed solely at commercial speech does not mean that its broader effect on the dissemination of noncommercial speech may be overlooked. To the contrary, as this Court most recently reaffirmed in *Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961, 4963 (U.S. June 24, 1983), every restriction on commercial speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed."

2. Respondent's only other effort to address this issue appears to be a suggestion that the impact of the Oklahoma ban is limited to commercial speech because cable operators have the technical capacity to delete wine commercials from programming.<sup>3</sup> This argument is specious in light of the undisputed illegality of such deletions under federal law.<sup>4</sup> Even as a technical matter, moreover, respondent has failed to show that the deletions may feasibly be made. Respondent relies entirely on a finding

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<sup>1</sup> Respondent's Brief in Opposition ("Opposition") at 7.

<sup>2</sup> Petition for Certiorari ("Petition") at 18-25.

<sup>3</sup> Opposition at 20-22.

<sup>4</sup> See Petition at 5-7, 19-20.

taken out of context from a report by the Federal Communications Commission.<sup>5</sup> While the Commission noted that deletion of commercials had proved to be technically possible in an experimental program, it pointed out that such deletion was "dependent on visual and audio cues in the program material."<sup>6</sup> The Commission decided not to adopt rules requiring deletion of commercial messages, finding such rules infeasible because of the inability of cable operators to secure the "close cooperation" of broadcasters necessary to enable the deletions to be made.<sup>7</sup>

As amply demonstrated in the record in this case, the deletion of wine commercials is similarly impracticable here because petitioners receive from broadcasters and programming services no advance warning or "visual and audio cues" to indicate when wine commercials will be forthcoming.<sup>8</sup> Cable operators testified below that to attempt to delete wine commercials in the absence of advance notice would require prohibitively expensive round-the-clock monitoring and that the deletions could not be completely and instantaneously executed.<sup>9</sup> Based on this showing, to which respondent offered no rebuttal evidence, the district court found that "[t]here exists no feasible way for [petitioners] to block out the advertisements,"<sup>10</sup> and the court of appeals did not disturb that finding.

3. The importance of the First Amendment question concerning noncommercial speech is emphasized in the briefs *amici curiae* filed in this case by organizations representing the full spectrum of the communications media

<sup>5</sup> *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972).

<sup>6</sup> *Id.* at 156.

<sup>7</sup> *Id.* at 165.

<sup>8</sup> See Appendix G to the Petition for Certiorari (District Court Opinion on Summary Judgment) at 40a.

<sup>9</sup> See Petition at 6.

<sup>10</sup> Appendix G to the Petition for Certiorari at 41a.

—print, broadcast, and cable<sup>11</sup>—and by a memorandum *amicus curiae* submitted by the Federal Communications Commission.<sup>12</sup> Significantly, the Commission's memorandum confirms petitioners' conclusion that pertinent federal law and regulations of the Commission prevent cable operators from deleting commercial messages from programming and thus that the Oklahoma ban effectively suppresses their dissemination of noncommercial speech.<sup>13</sup>

4. The importance of the noncommercial speech issues and the dangerous breadth of the decision below are further demonstrated by respondent's suggestion that under the theory of the present case Oklahoma could lawfully prevent the distribution of out-of-state print publications containing liquor advertising, although it chooses not to do so because of the difficulty of enforcement.<sup>14</sup>

<sup>11</sup> See Brief of Amicus Curiae National Association of Broadcasters at 3-5; Brief of Amici Curiae American Newspaper Publishers Association and Magazine Publishers Association at 2-4, 7-8; Brief Amicus Curiae of National Cable Television Association, Inc., *et al.*, at 13-16. See also Brief of Amici Curiae Oklahoma Press Association and Outdoor Advertising Association of Oklahoma.

<sup>12</sup> Memorandum of the Federal Communications Commission as Amicus Curiae at 9-13.

<sup>13</sup> *Id.* at 4-6, 9-13.

<sup>14</sup> Opposition at 2. Respondent apparently attempts to characterize the noncommercial speech issue as a preemption question. Opposition at 11. While the Oklahoma restrictions may indeed present issues regarding federal preemption, particularly insofar as they effectively prevent cable operators from transmitting signals that they are required to transmit under the Federal Communications Commission's "must-carry" rules, the preemption issues have not been ruled on below and are not now before this Court. Moreover, the "must-carry" rules, which most dramatically present the federal preemption question, are only a relatively minor part of petitioners' case. The majority of the signals and programming services offered by petitioners and affected by the Oklahoma ban are not required to be carried under the "must-carry" rules, but are instead selected voluntarily by the cable operators. See Petition at 5-7.

Respondent also suggests that this Court should for some reason defer consideration of the First Amendment issues presented here



## II.

1. Respondent also seeks to denigrate the importance of the commercial speech issues in the present case. At the same time, respondent appears to concede that Oklahoma's ban on liquor advertisements is precisely the sort of restriction on commercial speech that this Court has emphasized it will not tolerate—a content-based ban on the dissemination of truthful commercial speech about a lawful product, designed to diminish consumption of that product.<sup>15</sup> Respondent readily acknowledges that the purpose of its ban on liquor advertising is to reduce the consumption of alcoholic beverages.<sup>16</sup> Such a paternalistic regulation of commercial speech about a lawfully available, albeit controversial, product has been repeatedly condemned by this Court, which has emphasized that the better and constitutionally mandated approach is “to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.” *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).<sup>17</sup>

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until a case comes before it involving a conflict between a cable operator and the Federal Communications Commission or between a cable operator and a copyright owner. Opposition at 23-24. Although such cases might arise, they would not directly pose the question of a state's authority to impose sweeping restraints on cable television operators. It is that important question which is clearly presented here and which this Court, petitioners submit, should now consider.

<sup>15</sup> See Petition at 11-14. This concern was most recently demonstrated in *Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961 (U.S. June 24, 1983), in which the Court invalidated a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives.

<sup>16</sup> Opposition at 13.

<sup>17</sup> Respondent asserts that the liquor advertising ban directly combats traffic accidents and other symptoms of alcohol abuse and

2. Respondent does not deny that the wine advertisements in question concern a lawful activity and does not appear seriously to contend that they are false or deceptive within the meaning of decisions of this Court.<sup>18</sup> Nor does respondent attempt to justify the ban as a limited restriction on the time, place and manner of commercial expression about alcoholic beverages. To the contrary, respondent emphasizes the breadth of the ban, asserting that it permits no off-premises advertising of any kind regarding alcoholic beverages.<sup>19</sup>

3. Respondent asserts primarily that the commercial speech issue presented does not warrant review by this Court because Oklahoma's ban on liquor advertising is an appropriate exercise of state power under the Twenty-

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does so in a way that is not unnecessarily broad. Opposition at 15-19. Even if such a showing could justify a blanket ban on truthful, non-misleading speech, no such showing appears in this record. Respondent has not produced any evidence that the advertisements at issue contribute to alcohol abuse; that their elimination would significantly reduce alcohol abuse; or that there exist no alternative methods to promote temperance that would be less destructive of First Amendment rights. As the district court found, "[t]here is no evidence . . . that Oklahoma's ban on advertising is a direct means of preventing alcohol abuse or protecting the health, safety, or welfare of Oklahomans." Appendix G to Petition for Certiorari at 48a.

<sup>18</sup> Respondent's opposition includes several gratuitous statements to the effect that the wine advertisements seek "the artificial stimulation of consumption of alcoholic beverages by exaggerated displays of the 'good life' . . . ." Opposition at 8. See also *id.* at 9. As the court of appeals properly held in this case, the mere fact that an advertisement demonstrates a controversial product in a favorable light does not mean that it may be suppressed. *Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490, 499 n.7, 500 n.9 (10th Cir. 1983). See also *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

<sup>19</sup> Opposition at 2. In any event, characterization of the ban as a time, place and manner restriction would not "be tenable in light of [its] content-based prohibition." *Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. at 4964 n.18.



first Amendment. However, as shown in the petition, this claim directly conflicts with decisions of this Court that have repeatedly stressed that the Twenty-first Amendment does not grant states authority to infringe upon the Bill of Rights and does not change the standard of review under those provisions.<sup>20</sup> The decision principally relied on by respondent, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), is not to the contrary; indeed, it strongly supports petitioners. The Court in that case unanimously rejected the argument that the Twenty-first Amendment entitles a state to regulate wine prices in a way that conflicts with the federal antitrust laws. The Court emphasized that "important federal interests in liquor matters survived the ratification of the Twenty-first Amendment" and that the Amendment does not "insulate" state regulation from the requirements of equal protection or due process. *Id.* at 108.<sup>21</sup> Review of the present case by this Court is important because the court below has departed so markedly from these principles and, in addition, because of current efforts in other states to enact restrictions on the advertising of lawful alcoholic products.<sup>22</sup>

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<sup>20</sup> Petition at 15-16.

<sup>21</sup> While respondent continues to seek support in this Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), respondent fails to rebut petitioners' distinction of that case, see Petition at 14-15, or to show why the summary decision there should be dispositive here.

<sup>22</sup> See J. Winski, *Pressures Mounting To Curtail Liquor Advertising*, Ad Age, July 18, 1983, at 1. Petitioners note that respondents have misconstrued petitioners' reference to the Fifth Circuit panel opinions in *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, *reh'g en banc ordered*, 701 F.2d 335 (5th Cir. 1983), and *Dunagin v. City of Oxford*, 701 F.2d 335, *reh'g en banc ordered*, 701 F.2d 336 (5th Cir. 1983). See Opposition at 5-6. Petitioners did not suggest that these opinions, which found that Mississippi's restrictions on liquor advertising violated the

## CONCLUSION

For the reasons stated above and in the petition for certiorari, the writ should be granted.

Respectfully submitted,

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First Amendment, created a formal conflict between the Circuits, in light of the orders for rehearing *en banc* entered in both. Rather, petitioners cited the Fifth Circuit opinions because, in taking a position directly contrary to that adopted by the Tenth Circuit in this case, they demonstrate the importance of the issues presented here and provide a cogent and well-reasoned refutation of the Tenth Circuit's decision.